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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CYNTHIA A. FORRESTER,
Petitioner,

vs

JUDGE HOWARD LEE WHITE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Does the doctrine of judicial immunity bar a civil action for damages against a judge for demoting and discharging a court employee on account of her sex?

LIST OF PARTIES

The parties to this proceeding are the petitioner, Cynthia A. Forrester, and the respondent, Judge Howard Lee White.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Cynthia A. Forrester respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned proceeding on June 5, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 792 F.2d 647 (7th Cir. 1986), and is reprinted in the Appendix hereto at p. A-1.

The opinion of the United States District Court for the Southern District of Illinois granting respondent's motion for

summary judgment is unreported. It is reprinted in the Appendix hereto at p. A-49. The opinion of the district court denying respondent's motion for judgment notwithstanding the verdict and granting respondent's motion for a new trial is unreported. It is reprinted in the Appendix hereto at p. A-38.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit which petitioner requests this Court to review was entered June 5, 1986. On September 11, 1986, the court of appeals denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Cynthia Forrester was employed by the Jersey County, Illinois, Circuit Court for three and one-half years. She was hired in April, 1977 as Juvenile and Adult Probation Officer for the Court, and held that position until she was appointed Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project in July of 1979.[1] In the summer of 1980, Ms. Forrester was demoted to a non-supervisory position and on October 1, 1980, she was discharged.

Respondent Judge Howard Lee White, was, at all times material to this dispute, a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and Presiding Judge of the Circuit Court of Jersey County. Pursuant to Illinois law, Judge White was authorized to hire and discharge juvenile court probation

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[1] In her position as Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project, Ms. Forrester directed a program designed to divert juveniles from the court system. Her duties included administration, community and public relations, and direct intake work with juveniles. During the entire course of her employment, Ms. Forrester also performed juvenile probation work for the Jersey County Circuit Court. Her work as juvenile probation officer included investigation of complaints, referrals to social service agencies and assistance to the State's Attorney in the actual filing of cases. After a case was filed, she made recommendations for disposition and prepared presentence reports. She supervised juveniles on probation and when necessary recommended revocation. See pp. A-2 - A-5 of Appendix hereto.

officers. He was also the designated Project Director of the Juvenile Court Intake and Referral Services Project. Judge White hired Ms. Forrester in 1977, appointed her project supervisor in 1979, and demoted and discharged her in 1980. He was, throughout the course of her employment, Ms. Forrester's direct supervisor.

Ms. Forrester instituted this action in the United States District Court for the Southern District of Illinois, alleging that defendant White demoted and discharged her because of her sex in violation of 42 U.S.C. Section 1983 and the Fourteenth Amendment to the U.S. Constitution.[2]

The case was tried to a jury before U.S. Magistrate Gerald B. Cohn on January 3, 4, 5, 6 and 9, 1984. The jury returned a verdict for Ms. Forrester and against Judge White on Ms. Forrester's claims of sex discrimination and the jury assessed her damages of $81,818.80. Judgment to that effect was entered on January 10, 1984.

By an Order dated March 16, 1984, Magistrate Cohn denied defendant White's Motion for Judgment Notwithstanding the Verdict but granted White's Motion for New Trial.[3]

On March 30, 1984, defendant White filed a Motion for Summary Judgment arguing that the doctrine of judicial immunity barred Ms. Forrester's claim for damages. The Motion was granted and judgment was entered in favor of defendant White on April 13, 1984.

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[2] Claims against other individuals and against Jersey County, as well as claims under other federal statutes have been dismissed from the case.

[3] The Seventh Circuit noted in its opinion that Ms. Forrester's appeal challenges the grant of a new trial as well as the grant of summary judgment. The court of appeals did not, however, reach that issue in view of its decision that defendant White was absolutely immune from civil damage liability. See p. A-6, n.3 of Appendix.

The Court of Appeals for the Seventh Circuit upheld the decision of the District Court. The court ruled, in a decision written by Judge Eschbach with Judge Posner dissenting, that Judge White's decisions to demote and dismiss Ms. Forrester were judicial acts and that even if he had engaged in intentional sex discrimination, Judge White was entitled to absolute judicial immunity. In his opinion, Judge Eschbach wrote that the fundamental factor to consider in deciding whether Judge White was acting in his judicial capacity when he demoted and terminated Ms. Forrester was that "the functions performed by the plaintiff as a probation officer were inextricably tied to discretionary decisions that have consistently been considered judicial acts." See p. A-20 of Appendix hereto.

Pointing out that "the reasoning of the majority opinion extends to every consequential employment decision by every government official", Judge Posner's dissenting opinion argues that the failure to distinguish carefully among the different kinds of acts that judges perform is the fatal weakness of the majority opinion. Hiring and firing of subordinates, he writes, are executive, not judicial, functions. See pp. A-24, A-31 of Appendix hereto.

On September 11, 1986, the Seventh Circuit denied Ms. Forrester's Petition for Rehearing and Suggestion for Rehearing En Banc, with Judges Richard D. Cudahy, Richard A. Posner and Frank H. Easterbrook voting to grant a rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The decisions of this Court have adopted a "functional" approach to immunity law, limiting the defense of absolute official immunity to those situations in which judges, prosecutors and legislators are directly engaged in the function which is to be protected. *Harlow v. Fitzgerald,* 457 U.S. 800 (1981). The decision of the Seventh Circuit in this case conflicts with *Harlow* and other decisions of this Court. It extends judicial immunity to a judge's personnel decisions about a subordinate. Personnel decisions are actions clearly outside of the traditional judicial decision-making function.

A clear conflict also exists among the U.S. Courts of Appeal regarding the question of whether absolute immunity bars suits for damages by employees who have been discriminatorily discharged. In this case and in *Browning v. Clerk, U.S. House of Representatives,* 789 F.2d 923 (D.C. Cir. 1986), *cert. pending,* No. 86-547, the Seventh and D.C. Circuits hold that absolute immunity may bar such suits. These decisions conflict with decisions of the Eighth and Fifth Circuits in *Goodwin v. Circuit Court,* 729 F.2d 541, 548-49 (8th Cir) *cert. denied, 105 S.Ct. 112 (1984) and Davis v. Passman,* 544 F.2d 865 (5th Cir. 1977).[4] The *Goodwin* and *Passman* decisions refuse to extend absolute immunity to personnel decisions of governmental officials.

The Seventh and Eighth Circuit opinions in this case and *Goodwin* present a conflict regarding judicial immunity. The D.C. and Fifth Circuit decisions in *Browning* and *Passman* present a conflict in the law of legislative immunity.

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[4] A decision of the Fifth Circuit *en banc,* 571 F.2d 793 (5th Cir. 1978) dismissed the case on other grounds and thus did not reach the judicial immunity issue. This Court's decision overturning the *en banc* decision of the Court of Appeals for the Fifth Circuit, 442 U.S. 228, (1979) did not reach the immunity question, *Id.* at 235-36, n. 11, but did rule that "if petitioner is able to prevail on the merits, she should be able to redress her injury in damages." *Id.* at 248.

I. The Decision Below Conflicts With This Court's Decisions Adopting A "Functional" Approach To Immunity Law

The decisions of this Court regarding the scope of absolute official immunities to suit have carefully limited judicial, prosecutorial, and legislative immunity to those situations in which a governmental official is directly engaged in the function which is to be protected. In the decision in *Harlow v. Fitzgerald,* 457 U.S. 800, (1981), Justice Powell articulates the general principles governing the Court's rulings in this area:

> . . . in general our cases have followed a *"functional"* approach to immunity law. We have recognized that the judicial, prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant. In *Gravel,* for example, we emphasized that Senators and their aides were absolutely immune only when performing acts legislative in nature and not when taking other acts even "in their official capacity". . . . Out cases involving judges and prosecutors have followed a similar line. *Id.* at 810-11 (citations omitted) (emphasis added)

Harlow is the culmination of the painstaking development by this Court of a coherent body of immunity law. In *Gravel v. United States,* 408 U.S. 606, 625 (1972), this Court held that not all conduct of a legislator is shielded from suit by legislative immunity. Absolute legislative immunity extends only to those activities which are "an integral part of the deliberate, communicative processes" by which legislators participate in proceedings related to consideration and passage or rejection of legislation.

In *Imbler v. Pachtman,* 424 U.S. 409, 430-31 (1976), this Court explicitly recognized that prosecutorial immunity does not protect every act performed by a prosecutor in carrying out his official responsibilities. Noting that there might be some difficulty in drawing the proper line between functions, the decision states nonetheless that "at sometime, and with respect

to some decisions, the prosecutor no doubt functions as an administrator" and would not be entitled to absolute immunity for such decisions. *Id.* at 431, n. 33.

A similar functional test has been applied by this Court in the area of judicial immunity. In *Stump v. Sparkman,* 435 U.S. 349 (1978), this Court held that a judge is entitled to absolute immunity from liability only for his judicial acts and points out that "whether an act by a judge is a 'judicial' one relates to the nature of the act itself...and to the expectations of the parties." *Id.* at 362. Thus, the test developed by this Court in *Stump* requires a determination whether the act is a function normally performed by a judge and whether the parties dealt with the judge in his judicial capacity. *Id.* at 362.

In *Supreme Court of Virginia v. Consumer's Union,* 446 U.S. 719, 731 (1980) this Court reaffirmed the principle that judicial immunity applies only when judges are engaged in a judicial act. The judges' action complained of in that case did not "arise out of a controversy which must be adjudicated" and was, therefore, not a judicial act. *Id.* at 731. Noting that all official acts performed by judges are not judicial acts, this Court in *Consumers Union* describes judicial acts as "acts of adjudication." *Id.* at 731.

Judge White was not engaged in "acts of adjudication" when he demoted and discharged Cynthia Forrester. When the analysis is focused, as this Court's decisions require that it must be, on the nature of the challenged acts, the inescapable conclusion is that Forrester's demotion and termination were not judicial acts.

II. The Decision Below Conflicts With Decisions of the Eighth and Fifth Circuits Refusing to Extend Absolute Immunity to Personnel Decisions of Governmental Officials.

The narrower, more traditional interpretation of what constitutes a judicial act underlies the Eighth Circuit's holding in

Goodwin v. Circuit Court, 729 F.2d 541, 548-49 (8th Cir.) *cert. denied*, 105 S.Ct. 112 (1984). The Eighth Circuit's decision in *Goodwin* and the Seventh Circuit's decision in this case are in direct conflict.[5]

In *Goodwin*, the Circuit Court of St. Louis County and one of its judges were sued by a court employee who alleged that she was removed from her position as hearing officer for the court's juvenile division and transferred to the division's legal department because of her sex. Goodwin, like the plaintiff in this case, offered advice and made recommendations to the judge in the court where she was employed. The Eighth Circuit ruled that "the decision of whom to retain as a hearing officer is not an official judicial act. It is an administrative personnel decision." *Goodwin*, 729 F.2d at 549.

The conflict is heightened when the issue is considered in the context of immunity law as a whole. The Seventh Circuit's decision here conflicts with the Fifth Circuit's decision in the legislative immunity context in *Davis v. Passman*, 544 F.2d 865, 877-881 (5th Cir. 1977). In *Passman* the Fifth Circuit ruled that members of Congress are not immune from suit for their deci-

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[5] The decisions of several district courts are similarly in conflict with the Seventh Circuit's decision here. *Shore v. Howard*, 414 F. Supp. 379, 384-86 (N.D. Tex. 1976) (the dismissal of a probation officer is properly characterized as a ministerial or administrative as opposed to judicial act); *Clark v. Campbell*, 514 F. Supp. 1300, 1302-03 (W.D. Ark. 1981) (a county judge in hiring and firing county employees is exercising an administrative function and may not invoke the doctrine of judicial immunity); *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D. N.C. 1983) (appointment of magistrates is a ministerial rather than judicial act and not shielded by judicial immunity); *see also, Cronovich v. Dunn*, 573 F. Supp. 1330, 1335-1337, 573 F. Supp. 1342 (E.D. Mich. 1983) (the scope of immunity granted judges in personnel decisions is confused, but personnel actions are performed by judges in the ministerial phase of their executive roles); *contra, Blackwell v. Cook*, 570 F. Supp. 474 (N.D. Ind. 1983) (a judge's dismissal of a probation officer is protected by judicial immunity because of the probation officer's involvement in judicial decision-making).

sions to dismiss staff members. Such decisions, reasoned the Court, are not a part of the deliberative and communicative processes by which legislators consider and pass or reject legislation. *Id.* at 880. This approach parallels the narrower, more traditional approach which focuses on the particular function the immunity is intended to protect. The Fifth Circuit considered and rejected in *Passman, Id.* at 880, n. 25, the rationale of the decision here that personnel decisions regarding staff members who have "meaningful input" into the legislative process should be immune, on the theory that, "The prospect that a dismissal decision will in turn affect the legislative process is also quite remote. These layered causation gaps defeat the argument for absolute immunity."

Passman is in direct conflict in the legislative immunity area with the decision of the D.C. Circuit in *Browning v. Clerk, U.S. House of Representatives,* 789 F.2d 923 (D.C. Cir. 1986), *cert. pending,* No. 86-547. The reasoning of the *Browning* opinion parallels the reasoning in this case, focusing on the involvement of the discharged employee in the legislative process, rather than considering whether a personnel decision is, in itself, a legislative act.

The conflict presented by these cases is clear and requires resolution by this Court.

CONCLUSION

This Court ruled in *Butz v. Economou,* 438 U.S. 478, 507 (1978) that the grant of absolute immunity should be limited to those "*exceptional situations* where it is demonstrated that absolute immunity is *essential* for the conduct of public business." (emphasis added) Judge Eschbach writes that a judge's personnel actions must be shielded by absolute immunity because without the defense, a judge will not be free to act in a principled and independent manner in deciding cases. See pp. A-20 - A-21 of Appendix hereto. However, the Seventh Circuit's ruling in this case fails to further the purpose advanced as its justification.

Under the rule established here, the answer to the question of whether absolute immunity applies will depend on "the nature of the relationship" between the governmental official and the particular employee. See p. A-20 of Appendix hereto. A judge will be required to analyze the duties of each individual employee to determine whether a particular personnel decision is shielded by absolute immunity. Thus, the decision fails to provide judges a clear guide to the potential consequences of their acts.

Without a clear and unambiguous general rule, the extension of absolute immunity to the types of decisions at issue here serves no legitimate purpose. As Judge Posner points out in his dissent:

> "Absolute immunity provides real security only if the scope of the immunity is well defined. Under the court's approach the process of definition will be protracted and may never yield a clear rule on which employees or job applicants may sue which judges and which may not, and for what. We shall still have to buy liability insurance." See p. A-33 of Appendix hereto.

We are, as Judge Posner reminds in his dissenting opinion, "a society that prides itself on subjecting even its highest officials

to the restraints of the law." See p. A-24 of the Appendix hereto. As the Seventh Circuit majority admits in its opinion, absolute immunity from civil liability for deliberate wrongdoing inevitably results in injustice. See p. A-9 of Appendix hereto. This Court must exercise its authority here to confine such injustice to situations where it is not merely convenient but essential. *Butz v. Economou,* 438 U.S. 478, 507.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1823

CYNTHIA A. FORRESTER,
Plaintiff-Appellant,

v.

JUDGE HOWARD LEE WHITE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.
No. 82 C 3231—**Gerald B. Cohn,** *Magistrate.*

ARGUED APRIL 24, 1985—DECIDED JUNE 5, 1986

Before ESCHBACH and POSNER, *Circuit Judges, and* TIMBERS, *Senior Circuit Judge.* *

ESCHBACH, *Circuit Judge.* The primary question presented in this appeal is whether the doctrine of judicial immunity shields a state-court judge from liability for damages in a § 1983 action for alleged sex-based discrimination arising from the dismissal of a probation officer. The district court found that the defendant judge was immune. For the reasons stated below, we will affirm.

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* The Honorable William H. Timbers, Senior Circuit Judge for the Second Circuit, sitting by designation.

I

For the purposes of deciding this appeal, the facts may be summarized as follows:

Defendant Howard Lee White was at all times material to this dispute a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and served as Presiding Judge of the Circuit Court in Jersey County, Illinois, which is the state trial court of general jurisdiction for that county. The Chief Judge of the Seventh Judicial Circuit, or his designee, has the authority under Illinois law to hire and dismiss, at his, or his designee's, zleasure, juvenile-court probation officers. Ill. Rev. Stat, ch. 37, ¶¶ 706-1, 706-5(1) (1983). Judge White was acting as the designee of the Chief Judge for the purposes of hiring and firing juvenile-court probation officers.

In April of 1977, Judge White hired plaintiff Cynthia Forrester to serve as a juvenile and adult probation officer and a director of court services for the Circuit Court. She worked under Judge White's direct supervision until her termination. As an adult-probation officer,[1] she prepared pre-sentencing

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[1] The statutory duties of an adult-probation officer are set forth in Ill. Rev. Stat., ch. 38, ¶ 204-4 (1983), as follows:

> (1) To investigate as required by section 5-3-1 of the "Unified Code of Corrections", approved July 26, 1972, as amended, the case of any person to be placed on probation. Full opportunity shall be afforded a probation officer to confer with the person under investigation when such person is in custody.
>
> (2) To notify the court of any previous conviction for crime or previous probation of any defendant invoking the provisions of this act.
>
> (3) All reports and notifications required in this Act to be made by probation officer shall be in writing and shall be filed by the clerk in the respective cases.
>
> (4) To preserve complete and accurate records of cases investigated, including a description of the person investigated, the action of the court with respect to his case and his probation,

reports in all felony cases for the judge to consider, monitored the actions of adults placed on probation, and filed recommen-

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the subsequent history of such person, if he becomes a probationer, during the continuance of his probation, which records shall be opern to inspection by any judge or by any probation officer pursuant to order of court, but shall not be a public record, and its contents shall not be divulged otherwise than as above provided, except upon order of court.

(5) To take charge of and watch over all persons placed on probation under such regulations and for such terms as may be prescribed by the court, and giving to each probationer full instructions as to the terms of his release upon probation and requiring from him such periodical reports as shall keep the officer informed as to his conduct.

(6) To develop and operate programs of reasonable public service work for any persons placed on probation or supervision, providing, however, that no probation officer or any employee of a probation office acting in the course of his official duties shall be liable for any tortious acts of any person placed on probation or supervision as a condition of probation or supervision, except for wilful misconduct or gross negligence on the part of the probation officers or employee.

No person assigned to a public service employment program shall be considered an employee for any purpose, nor shall the county board be obligated to provide any compensation to such person.

(7) When any person on probation removes from the county where his offense was committed, it shall be the duty of the officer under whose care he was placed to report the facts to the probation officer in the county to which the probationer has removed; and it shall thereupon become the duty of such probation officer to take charge of and watch over said probationer the same as if the case originated in that county; and for that purpose he shall have the same power and authority over said probationer as if he had been originally placed in said officer's charge; and such officer shall be required to report in writing once a month the results of his supervision to the probation officer in whose charge the said probationer was originally placed by the court.

(8) To perform such other duties as are provided for in this act or by rules of court and such incidental duties as may be implied from those expressly required.

dations for revocations as necessary. As a juvenile-probation officer,[2] Forrester received and investigated complaints regar-

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[2] The statutory duties of a juvenile-probation officer are set forth in Ill. Rev. Stat., ch. 37, ¶ 706-1 (1983), as follows:

> (a) To receive, investigate and evaluate complaints indicating delinquency, behavior otherwise requiring supervision, neglect or dependency, within the meaning of Sections 2-2 through 2-5; to determine or assist the complainant in determining whether a petition should be filed under Section 4-1 or whether referral to an agency, association or other person or whether some other action is advisable; and to see that the indicating filing, referral or other action is accomplished.
>
> (b) When a petition is filed under Section 4-1, to make prehearing investigations and formulate recommendations to the court.
>
> (c) To counsel and, by order of court, to supervise minors referred to the court; to conduct indicated programs of casework, including referrals for medical and mental health service, organized recreation and job placement for wards of the court and, when appropriate, for members of the family of a ward; to act as liaison officer between the court and agencies or associations to which minors are referred or through which they are placed; when so appointed, to serve as guardian of the person of a ward of the court; to provide probation supervision and protective supervision ordered by the court; and to provide like services to wards and probationers of courts in other counties or jurisdcitions who have lawfully become local residents.
>
> (d) To arrange for placements pursuant to court order.
>
> (e) To assume administrative responsibility for such detention, shelter care and other institutions for minors as the court may operate.
>
> (f) To maintain an adequate system of case records, statistical records, and financial records related to juvenile detention and shelter care and to make reports to the court and other authorized persons, and to other governmental bodies lawfully requiring them.
>
> (g) To perform such other services as may be appropriate to effectuate the purposes of this Act or as may be directed by any order of court made under this Act.

ding status offenders, possible abuse and neglect cases, and juveniles charged with criminal conduct. After an investigation, she referred such cases to social agencies for treatment, provided counseling herself, or worked with the State's Attorney in filing cases in juvenile court. When juvenile court cases were filed, she assisted in preparing them for hearings; in addition, she made recommendations for disposition and prepared presentencing reports for the judge to consider in deciding what should be done with the juvenile. When a juvenile was placed under court supervision or on probation, she monitored the juvenile to assure that he was complying with the terms of court orders. When necessary, she recommended revocations.

Forrester performed these duties until July 1979. At that time, Jersey County received a grant from the State of Illinois to operate the Jersey County Juvenile Court Intake and Referral Services Project. The project was designed to divert juveniles from the court system by providing alternative methods of remedying their problems. When the project started, Judge White appointed Forrester the Project Supervisor and her duties increased commensurably. In this capacity, she was responsible for directing and supervising project staff members, establishing an office and new procedures, maintaining records, making reports, and ensuring that the program met federal and state requirements. She was also required to recruit advocate volunteer counselors to work with juveniles, contract with other social-services agencies, develop a community organization that would provide foster homes, and manage public relations. In addition, Forrester did a large portion of the work with juveniles under the grant project and continued to do juvenile probation work.

White discharged Forrester on October 1, 1980. Forrester also claims that she was improperly demoted prior to her dismissal. We note that the parties presented evidence at trial relating to conflicts between Forrester and a male co-worker and to disputes between Forrester and Judge White regarding Forrester's schedule. These facts, however, are not pertinent to

the disposition of this appeal, because Forrester has alleged that she was discriminated against on the basis of her sex. Thus, in considering the propriety of the district court's decision on judicial immunity, we must assume that Judge White demoted and dismissed Forrester on the basis of her sex. The disputes Forrester may have had with co-workers and Judge White are reasons for her demotion and termination that are not related to her sex, and will not be considered.

In July 1982, Forrester filed an action in federal district court and sought recovery under Title VII of the Civil Rights Act of 1964, as well as 42 U.S.C. §1983 and the Fourteenth Amendment. The procedural history of this litigation is rather involved; much of what transpired below is not relevant to the judicial-immunity question and will not be discussed. Suffice it to say that Forrester pursues on appeal only her § 1983 claim, in which she alleged that she was demoted and terminated by Judge White on the basis of her sex in violation of the equal-protection clause of the Fourteenth Amendment. Although she initially sought both equitable and monetary relief, only her claim for damages remains on appeal.

The § 1983 claim was tried to a jury, which returned a verdict for Forrester and awarded approximately $82,000 in compensatory damages. The district court denied Judge White's motion for judgment notwithstanding the verdict, but granted his motion for a new trial. Judge White then filed a motion for summary judgment in which he argued that he was entitled to absolute immunity from a civil-damage award. The district court agreed and entered judgment in favor of the defendant. Forrester now appeals.[1]

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[1] Forrester challenges both the grant of summary judgment and the grant of a new trial. In view of our decision that the defendant is absolutely immune from civil-damage liability, we express no opinion as to the propriety of the district court's ruling on the defendant's motion for a new trial.

II

In deciding whether the district court correctly ruled in Judge White's favor, we must first consider the general principles behind the immunity defense. Courts in this country and in England have embraced the doctrine of judicial immunity for centuries.[4] The Supreme Court first articulated the current doctrine in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), in which it ruled that, in order to safeguard principled and independent decision-making, a judge may not be held to answer in civil damages for those "judicial acts" committed in the exercise of his "jurisdiction."[5] *See also Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099 (1978); *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213 (1967). The defense does not simply shield judges from civil liability, but also from the related trial proceedings. *Mitchell v. Forsyth*, ___ U.S. ___, 105 S. Ct. 2806, 2816 (1985).[6] It will not however, protect a judge from injunctive relief, *see Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S. Ct. 1970, 1981 (1984), or from criminal prosecution, *see O'Shea v. Littleton*, 414 U.S. 488, 503, 94 S. Ct. 669, 680 (1974); *Ex parte*

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[4] For a discussion of the development of the doctrine in England, see *Pulliam v. Allen*, 466 U.S. 522, 528-36, 104 S. Ct. 1970, 1974-78 (1984).

[5] Prior to *Bradley*, the Court had stated in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868), that judges were not responsible "to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, *unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly.*" *Id.* at 537 (emphasis added). In *Bradley*, the court reconsidered that statement and concluded that "the qualifying words used were not necessary to a correct statement of the law." 80 U.S. (13 Wall.) at 351.

[6] It is primarily for this reason that district-court decisions concerning absolute immunity are immediately appealable. *Mitchell v. Forsyth*, ___ U.S. ___, ___, 105 S. Ct. 2806, 2815 (1985).

Virginia, 100 U.S. 339 (1879). In addition, judicial immunity is a creature solely of the common law.[7] However, although it had the constitutional authority to do so, Congress did not abrogate the defense in enacting § 1 of the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983. *See Pierson*, 386 U.S. at 554-55, 87 S. Ct. at 1217-18.[8]

The scope of the defense will be construed broadly to effectuate its purposes, *Dykes v. Hosemann*, 776 F.2d 942, 947 (11th Cir. 1985) (en banc) (per curiam), and when it applies, it is absolute and does not depend on the motives of the judge; thus, it is available even if the judge is accused of acting maliciously or corruptly. *Bradley*, 80 U.S. (13 Wall.) at 351; *see also Pierson*, 386 U.S. at 554, 87 S. Ct. at 1218. It must be remembered, however, that it is for the benefit of the public, not corrupt judges. *Pulliam*, 466 U.S. at 532, 104 S. Ct. at 1976; *Bradley*, 80 U.S. (13 Wall.) at 350. As Judge Learned Hand explained in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the in-

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[7] Thus, judicial immunity differs from the immunity afforded members of Congress, as the latter is guaranteed by the Speech or Debate Clause of Art. I, § 6 of the Constitution. *See generally Doe v. McMillan*, 412 U.S. 306, 93 S. Ct. 2018 (1973); *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783 (1951). In addition, judicial immunity affords less protection than legislative immunity under the Speech or Debate Clause. *See, e.g., Dennis v. Sparks*, 449 U.S. 24, 30, 101 S. Ct. 183, 187 (1980).

[8] Congress did, however, abrogate the defense for purpose of awarding attorney's fees under 42 U.S.C. § 1988 in cases where prospective injunctive relief against a judge is granted. *See Pulliam v. Allen*, 466 U.S. 522, 543-44, 104 S. Ct. 1970, 1981-82 (1984).

> juries he may so cause; and, if it were possible *in practice* to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

177 F.2d at 581 (emphasis added). *See also McCray v. Maryland,* 456 F.2d 1, 3 (4th Cir. 1972). Thus, the effect of the doctrine may be at times harsh in the individual case, *Stump,* 435 U.S. at 363, 98 S. Ct. at 1108, because conflicting interests define the scope of the immunity. The defense presents a tension between the general and the particular, and demonstrates that, in order to safeguard the judicial system generally, some instances of injustice are, unfortunately, inevitable. *See id.; cf. Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893 (1976); *Stephens v. Heckler,* 766 F.2d 284, 287-88 (7th Cir. 1985).

The Supreme Court in *Bradley* identified five considerations in support of judicial immunity. First a judge must be able to act on his own convictions without apprehension of personal

consequences. Second, because litigation necessarily involves controversy and competing interests, losing parties are quick to ascribe malevolent motives to a judge. Third, because of the ease of alleging bad faith, a qualified "good faith" immunity would be virtually worthless to secure the desideratum of an independent judiciary. Fourth, the prospect of defending civil-damage actions and satisfying judgments would force judges to employ wasteful and distracting devices, such as unnecessarily meticulous record-keeping, to guard against liability and would render judges less inclined to rule forthrightly. Finally, other safeguards, such as appeal and impeachment, reduce the need for private rights of action for damages against judges. *See Bradley,* 80 U.S. (13 Wall.) at 347-54. To these considerations, one should add a sixth: the need to assure quiescence and finality of judgment by reducing the number of possible collateral challenges to judicial decisions. *See Holloway v. Walker,* 765 F.2d 517, 522 (5th Cir.), *cert. denied,* ____ U.S. ____, 106 S. Ct. 605 (1985).

Of course, if the concerns articulated in *Bradley* in favor of immunity were the only ones we should consider, then there would be no countervailing force and immunity should expand to cover all aspects of a judge's life, professional and private. It is undoubtedly vexing for a judge to be named as a defendant in litigation arising out of, for example, an automobile accident or a domestic dispute; thus, immunity would reach these aggravations so that a judge might rule without distraction on the cases before him. However, we must take into account the cost of dismissing meritorious complaints against judicial officers. The case law has drawn a line between those activities implicating the substance of the judge's decision in the cases before him and those that may consume the judge's time, energy, and money, but should not influence the substance of those decisions. *See, e.g., Harris v. Harvey,* 605 F.2d 330, 336 (7th Cir. 1979), *cert. denied,* 445 U.S. 938 (1980); *Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974). In sum, immunity does not shield judges from the trials of life generally.

As the discussion above suggests, it is the nature of the act committed (that is, the relation it has to the process of adjudication), not the identity of the actor who commits it, that determines whether immunity applies. *See Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719, 100 S. Ct. 1967 (1980); *Butz v. Economou,* 438 U.S. 478, 98 S. Ct. 2894 (1978); *Stump,* 435 U.S. at 362, 98 S. Ct. at 1107. Using this functional test, the courts have extended absolute immunity to participants (other than judges) in the judicial process and to officials (other than judges) in the judicial process and to officials (other than judges) who carry out "quasi-judicial" functions. The Supreme Court has, for example, granted absolute immunity to federal hearing examiners, administrative law judges, grand jurors, witnesses, and federal and state prosecutors. *See Cleavinger v. Saxner,* ____ U.S. ____, ____, 106 S. Ct. 496, 500 (1985). This court has provided immunity to similarly situated defendants. *See, e.g., Scott v. Schmidt,* 773 F.2d 160 (7th Cir. 1985) (harness racing counsel); *Mother Goose Nursery Schools, Inc. v. Sendak,* 770 F.2d 668 (7th Cir. 1985) (state attorney general when reviewing contracts on behalf of state), *cert. denied,* ____ U.S. ____, 106 S. Ct. 884 (1986); *Trotter v. Klincar,* 748 F.2d 1177 (7th Cir. 1984) (parole board); *Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1983) (liquor commission); *Ashbrook v. Hoffman,* 617 F.2d 474 (7th Cir. 1980) (state partition commission).

At times the courts have relied on the presence of other controls on judicial action, such as the availability and scope of appellate reveiw, in determining whether to allow the defense. *See, e.g., Cleavinger,* ____ U.S. at ____, 106 S. Ct. at 503-04 (1985); *Butz v. Economou,* 438 U.S. 478, 98 S. Ct. 2894 (1978). However, the full array of alternative procedural safeguards is not a prerequisite to the grant of immunity. *See Stump,* 435 U.S. at 368-69, 98 S. Ct. at 1111 (Stewart, J., dissenting); *Mother Goose,* 770 F.2d at 675 n.6; *Reed,* 704 F.2d at 952. In addition, it has been clear since *Bradley* that an official does not have to serve under terms similar to those of Article III (that is,

by appointment with life tenure and no reduction in compensation) in order to invoke the defense. Indeed, as noted above, absolute immunity has been extended to prosecutors and to grand-jury members, even though both exercise their authority subject to little review and do not enjoy the independence of federal judges. By the same token, no one could reasonably argue that the Justices of the United States Supreme Court are not entitled to absolute judicial immunity, *see Moore v. Burger*, 655 F.2d 1265 (D.C. Cir. 1981), even though their decisions are not subject to review by a superior tribunal. One must at times rely on devices other than Article III and direct appellate review to control judicial action. *Cf. Nixon v. Fitzgerald*, 457 U.S. 731, 757-58 & n.39, 102 S. Ct. 2690, 2705 & n.39 (1982).

Thus, the decision to allow the defense of judicial immunity in a particular case calls for a balancing of these competing concerns. *Dennis v. Sparks*, 449 U.S. 24, 31-32, 101 S. Ct. 183, 188 (1980); *Dykes*, 776 F.2d at 942; *Gregory*, 500 F.2d at 63 n.4. The terms "judicial act" and "jurisdiction" are not self-evident, and only signal the conclusion, rather than the beginning, of a chain of inferences. The characterization given an act depends on the weight of the interests at stake. For certain acts, however, such as the rendering of a judgment, the balance is straight-forward and the law, therefore, settled. *See, e.g., Lowe v. Letsinger*, 772 F.2d 308, 312 (7th Cir. 1985). For other acts, a critical evaluation of the concerns underlying the defense is required.

It is not surprising that the plaintiffs in the majority of suits against judicial officers in which the immunity doctrine is successfully invoked are either actual litigants or (as in *Stump*) individuals with an interest in the litigation. In these cases, the concerns of *Bradley* and its progeny are implicated without question. There is another line of cases, however, in which a former employee of a judge brings suit challenging his dismissal. As we will explain below, the rationale of decisions involving disgruntled litigants is not necessarily applicable to those involving former judicial employees.

The federal courts disagree on the scope of the immunity defense for decisions regarding judicial personnel. *See Goodwin v. Circuit Court,* 729 F.2d 541, 548-49 (8th Cir.) (judge's transfer of hearing officer was administrative, not judicial, decision; thus judge not absolutely immune), *cert. denied,* ____ U.S. ____, 105 S. Ct. 112 (1984) and ____ U.S. ____, 105 S. Ct. 1194 (1985); *Laskowski v. Mears,* 600 F. Supp. 1568 (N.D. Ind. 1985) (if relationship with probation officer implicates judge's independence, then dismissal is judicial act); *Cronovich v. Dunn,* 573 F. Supp. 1340, 1342 (E.D. Mich. 1983) (scope of immunity for judges' personnel decision unclear), *Id.,* 573 F. Supp. 1330, 1335 (E.D. Mich. 1983) (failure to appoint plaintiff as Friend of Court not judicial act);*Blackwell v. Cook,* 570 F. Supp. 474 (N.D. Ind. 1983) (judge absolutely immune in § 1983 suit challenging dismissal of family counselor for county probation office); *Lewis v. Blackburn,* 555 F. Supp. 713 (W.D.N.C. 1983) (decision by state judge not to reappoint magistrate not judicial act), *rev'd on other grounds,* 759 F.2d 1171 (4th Cir.), *cert. denied,* ____ U.S. ____, 106 S. Ct. 228 (1985); *Marafino v. St. Louis County Circuit Court,* 537 F. Supp. 206 (E.D. Mo. 1982) (plaintiff who sought position as juvenile-court staff attorney could invoke Title VII in action for discriminatory refusal to hire because staff attorney does not deal with judge in latter's judicial capacity), *aff'd on other grounds,* 707 F.2d 1005 (8th Cir. 1983); *Pruitt v. Kimbrough,* 536 F. Supp. 764 (N.D. Ind. 1982) (state judge immune from damages for dismissal of probation officer), *aff'd mem.,* 705 F.2d 462 (7th Cir. 1983); *Clark v. Campbell,* 514 F. Supp. 1300 (W.D. Ark. 1981) (county judge in hiring and firing county employees, not performing judicial function); *Shore v. Howard,* 414 F. Supp. 379 (N.D. Tex. 1976) (state judge's dismissal of probation officer not judicial act); *cf. Abbott v. Thetford,* 534 F.2d 1101 (5th Cir. 1976) (en banc) (under balancing test of *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968), judicial officer not liable in civil-rights action challenging discharge of chief probation officer), *cert. denied,* 430 U.S. 954 (1977). This

uncertainty in the case law is understandable, because decisions regarding court personnel depart from the paradigm of *Bradley* and its progeny. However, that does not mean that immunity is not available. It is, for example, of fundamental importance that the modern judge differs from his predecessor in that he must rely more on his staff for advice on substantive decisions, and that certain research functions formerly performed by the judge are now accomplished in part by his staff. A judge's institutional personality, therefore, extends beyond his person. Thus, suits brought by former court personnel may have a powerful, albeit indirect, effect on the rights of litigants. The dispositive question in a particular case is whether that effect bears an appropriate relationship to the judicial process, and hence warrants a grant of immunity.

We pause for a moment to consider the scope of immunity applicable to the personnel decisions of nonjudicial officials. Although the immunity accorded these individuals is not necessarily controlling in the case before us, it may provide strong support for our ruling, if that immunity is shaped and informed by a similar rationale. In *Nixon v. Fitzgerald,* 457 U.S. 731, 102 S. Ct. 2690 (1982), for example, the Supreme Court held that the President was absolutely immune from suits based on his personnel decisions. The Court also noted in a related action, *Harlow v. Fitzgerald,* 457 U.S. 800, 811-13, 102 S. Ct. 2727, 2735-36 (1982), that presidential aides might, under certain circumstances, enjoy the same immunity for these decisions.

With reference to legislators, the Court has not provided a definitive ruling. In *Davis v. Passman,* 442 U.S. 28, 99 S. Ct. 2264 (1979), a former congressional staff member alleged that a United States Congressman had, in violation of the Fifth Amendment, discriminated on the basis of sex in terminating her. The Court concluded that the plaintiff was asserting a constitutionally protected right, that he complaint stated a case of action, and that damages were the appropriate remedy.

Nonetheless, it was at pains to point out that, while upholding the complaint, it expressed no opinion on the possible immunity defenses of the defendant Congressman. *See* 442 U.S. at 236 n.11, 246 n.25, 249, 99 S. Ct. at 2272 n.11, 2278 n.25, 2279. *Cf. Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 397-98, 91 S. Ct. 1999, 2005 (1971) (ruling on immunity reserved).

In *Browning v. Clerk,* No. 85-5144 (D.C. Cir. Apr. 25, 1986), the District of Columbia Circuit addressed the question left unanswered in *Davis.* In *Browning,* the former Official Reporter of the United States House of Representatives brought a civil-rights action in which she alleged that her termination was motivated by a racial animus. The court, in holding that the Speech or Debate Clause provided the defendants, members of the United States House of Representatives, with absolute immunity for this personnel decision, stated:

> The touchstone in determining whether the Speech or Debate Clause immunity attaches is whether the activities at issue were "an integral part of the deliberative and communicative processes [of Congress]," ...such that the activity is legislative in character. Personnel decisions are an integral part of the legislative process....Thus, if the employee's duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the "discharge of their functions," personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny.

Slip op. at 12 (citations omitted). The court found that the plaintiff's duties were directly related to the "due functioning of the legislative process," so that the decision to discharge her was legislative in nature and, thus, immunized by the Clause. Similarly, the First Circuit held in *Agromayer v. Colberg,* 738 F.2d 55 (1st Cir.), *cert. denied,* ____ U.S. ____, 105 S. Ct. 515 (1984), that the defendant, the President of the Puerto Rico House of Representatives, had absolute legislative immunity under the common law in an action challenging his refusal to hire the plaintiff to serve as a press officer. *See also Hudson v.*

Burke, 617 F. Supp. 1501 (N.D. Ill. 1985); *cf.* 42 U.S.C. § 2000e(f); *Clark v. Tarrant County,* 608 F. Supp. 209, 212-14 (N.D. Tex. 1985).

Thus, far from placing the judicial branch above the executive and legislative branches, a decision today in favor of the defendant would do no more than extend to the judiciary the immunity from civil damages arising out of certain personnel decisions that is already enjoyed by the coordinate branches. Separation-of-powers concerns are, of course, a component of the judicial decisions relating to the personnel actions of the federal executive and legislative branches (and might result in a more comprehensive immunity for those branches than that accorded the judiciary). By the same token, questions of comity and federalism are raised in federal suits against state officials. In any event, the unifying rationale is that, if an employee's duties are intimately related to the functioning of the particular process (whether executive, legislative, or judicial on either the federal or state level), then personnel decisions regarding that employee are also part of the process.

We turn now to the facts of this case. The plaintiff alleges that she was discharged on the basis of her sex. The first question usually addressed in deciding whether a judge may invoke the defense of judicial immunity is whether he was acting within his "jurisdiction." *See Stump,* 435 U.S. at 356, 98 S. Ct. at 1104-05. As noted earlier, this is not a self-defining term. In the case of a disgruntled litigant, the question is whether the judge had jurisdiction over the subject matter of the dispute. *Id.; Dykes,* 776 F.2d at 945-50. It is clear, nontheless, that a judge may be acting within his jurisdiction outside, as well as inside, the courtroom. *See, e.g., Lopez v. Vanderwater,* 620 F.2d 1229, 1234 (7th Cir.), *cert. dismissed,* 449 U.S. 1028 (1980).

The plaintiff's claim in the instant case, however, did not arise directly out of litigation before the court, so the question of subject-matter jurisdiction makes little sense. Still, that does

not foreclose the defense in this case, because we believe that the more general concern articulated in *Bradley* and its progeny is whether the judge was acting within the scope of his "authority." It has been clear since the doctrine's inception that, if a judicial officer is acting in a clear absence of power, immunity will not spare him from the consequences of his acts. *See Bradley,* 80 U.S. (13 Wall.) at 352; *see also Gregory,* 500 F.2d 59. This is the only aspect of the doctrine that has anything resembling a "good faith" component. In the case of litigants, subject-matter jurisdiction defines the specific scope of that general authority. In the context of the dismissal of a staff member, it is our opinion that the threshold question is this. was the judge *authorized* to discharge the plaintiff? The answer in this case is an unqualified yes. In fact, under Illinois law, judges alone are authorized to dismiss juvenile-probation officers.

The more difficult question, of course, is whether the dismissal of the plaintiff was a "judicial act." Again, this is not a self-defining term. It is too much to say that judicial acts are those things that judges do. Such a definition is not only circular, but also results in an unnecessary extension of the immunity doctrine, because it would shield a judge from personnel actions unrelated to the decisional process. An example would be the refusal to hire an individual to serve as a janitor. The reasons supporting judicial immunity are not properly implicated in such a case, even though a judge's apprehension of the possibility of a civil-damage action arising out of the refusal to hire a janitor may affect his mood and distract him from the tasks at hand (and, therefore, affect the rights of the litigants before him). As noted above, it cannot be the idiosyncracies of a particular judge, or even those of human nature generally, that warrant the application of judicial immunity. Rather, the critical inquiry is whether the person affected by the judge's acts stands in such a relationship to the judicial system as would make immunity appropriate in light of the concerns expressed above. A janitor is not required to provide a judge with advice

and information concerning pending cases. Thus, judicial immunity would not protect the judge who refuses to hire an individual to be a janitor.[9]

The Supreme Court in *Stump* developed a two-part test to determine whether a judicial act was at issue. Although articulated in an action brought by a party involved in litigation before the defendant judge, this test addresses the general concerns behind the defense, and there is no reason why it should not apply in the instant case. First, was the function one normally performed by a judge? Second, was the plaintiff dealing with the judge in his judicial capacity? 435 U.S. at 362, 98 S. Ct. at 1107. The answer to the first prong of the inquiry was adumbrated above: under Illinois law, only a judge may order the dismissal of the plaintiff; thus, this function is "normally performed by a judge."

The second prong is troublesome. It is true that judges are protected only when they are acting as "judges," not as administrators.[10] However, saying that something is an administrative act, as opposed to a judicial one, simply states the

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[9] By the same token, absolute immunity should not bar a damage action challenging a judge's dismissal of, for example, a court reporter or bailiff. The relationship between a judge and such an employee is perhaps most accurately characterized as "administrative," *i.e.*, one unrelated to the exercise of the judge's discretion. Because a court reporter or bailiff is not as a general matter required to provide a judge with information and advice regarding the substance of the litigation before the court, so that discord between the employer and employee would not implicate the judge's institutional rile within the court system, the defense of absolute immunity would be inappropriate. *Cf. Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, ____ U.S. ____, 105 S. Ct. 512 (1984).

[10] *See Stump v. Sparkman*, 435 U.S. 349, 361 n.10, 98 S. Ct. 1099, 1107 n.10 (1978) (discussing *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), and *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970)); *see also Lowe v. Letsinger*, 772 F.2d 308, 312 (7th Cir. 1985) (judicial immunity does not apply to ministerial acts) (citing *Ex parte Virginia*, 100 U.S. 339 (1879)).

conclusion. Certain decisions made by judges outside the courtroom may be administrative in one setting and judicial in another. There is substantial overlap between the two, and the characterization cannot be made without reference to the purposes of immunity.

State law often provides an answer. As suggested above, it may determine, for example, who is in fact a "judge." However, while state law may conclusively determine when a judge is *not* entitled to immunity, *see, e.g., Clark v. Campbell,* 514 F. Supp. 1300 (W.D. Ark. 1981), it does not always determine when a judge *is* entitled to immunity, because a state may assign a task to a judge for reasons unrelated to safeguarding principled and independent decision-making.

The assignment under Illinois law to judges of supervision over probation officers is, we believe, directly related to the principles underlying the defense of immunity. There is no question that, in her capacity as a probation officer, the plaintiff was dealing with the defendant in the latter's capacity as a judge. She was rendering advice and recommendations for dispositions to be made by the judge, and the information she provided directly implicated the exercise of the judge's discretionary judgment. *See Abbott,* 534 F.2d 1101; *Pruitt,* 536 F. Supp. 764. Decisions regarding, for example, sentencing, probation, and the revocation of parole and probation are unquestionably judicial acts, and the plaintiff provided crucial advice and information necessary to making those decisions. Her relationship was by necessity founded on confidence and confidentiality. These attributes of the position are the primary reasons that probation officers themselves have derivative absolute immunity. *See Spaulding v. Nielsen,* 599 F.2d 728 (5th Cir. 1979) (probation officer immune from damages for alleged misconduct in investigation and preparation of pre-sentence report); *Burkes v. Callion,* 433 F.2d 318 (9th Cir. 1970) (probation officer has derivative judicial immunity), *cert. denied,* 403 U.S. 908 (1971); *Blackwell,* 570 F. Supp. at 478-79 (immunity of pro-

bation officers); *Richardson v. Grundel*, 85 Ill. App. 3d 46, 406 N.E.2d 575 (1980) (immunity of probation officer under Illinois law); *see also Scott v. Dixon*, 720 F.2d 1542 (11th Cir. 1983) (immunity of court clerk), *cert. denied*, ____ U.S. ____, 105 S. Ct. 122 (1984); *Briscoe v. Lahue*, 663 F.2d 713, 722 (7th Cir. 1981) (immunity of court reporter), *aff'd on other grounds*, 460 U.S. 325, 103 S. Ct. 1108 (1983); *Dieu v. Norton*, 411 F.2d 761 (7th Cir. 1969) (immunity of court clerk and reporter).[11]

The fact that the functions performed by the plaintiff as a probation officer were inextricably tied to discretionary decisions that have consistently been considered judicial acts is the fundamental factor to consider in deciding whether the defendant was acting in a judicial capacity when he demoted and terminated the plaintiff. *See Lewis*, 555 F. Supp. 713; *Marafino*, 537 F. Supp. 206; *Pruitt*, 536 F. Supp. 764. We stress, however, that the nature of this relationship depends on the facts of each case. We cannot set forth a general rule, because the interaction between the judge and the members of his staff does not always appropriately implicate the decisions of the judge *qua* judge. *See Goodwin*, 729 F.2d at 548-49 (relationship between judge and hearing officer too distant to implicate substance of judge's decisions). Each court system differs in the manner in which it allocates responsibility to court personnel. However, because the employment relationship at issue here was dominated by acts that were unquestionably taken in the defendant's judicial capacity within the meaning of *Bradley*, *Stump*, and their progeny, the contested actions of the defendant in demoting and dismissing the plaintiff would affect his ability to act in a prin-

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[11] This is not to suggest that a judge would be immune in every damage action brought by a former employee who enjoyed derivative immunity while working for the judge. However, it is unlikely that a judge would be immune in an action brought by an employee who did *not* have derivative immunity, because the lack of derivative immunity indicates that the employee was removed from the discretionary decision-making process.

cipled and independent manner in his role as a judge if he could not undertake those actions without the protection of the defense. We conclude, therefore, that he is entitled to absolute immunity from civil damages in this case.

The evil to be avoided is the following: A judge loses confidence in his probation officer, but hesitates to fire him because of the threat of litigation. He then retains the officer, in which case the parties appearing before the court are the victims, because the quality of the judge's decision-making will decline. In this case, four of the five factors discussed in *Bradley* are directly implicated. First, the judge will not be able to act on his convictions in deciding cases, because he will not have the aid of a probation officer in whom he has trust and confidence. Second, he will be driven to wasteful self-protective devices. Third, alternative safeguards, such as impeachment, censure, equitable and declaratoy relief, and market forces, reduce the need for a private damage action. Finally, the ease of alleging bad faith in the demotion and dismissal renders good-faith immunity virtually worthless. The judge may also be open to suits from litigants who discover that his professional relationship with his probation officer has declined, and he may thus expose himself to charges of impropriety and lose the respect necessary for the effective discharge of his responsibilities.

One could say a conscientious judge would act on his convictions and discharge the employee, but this is an argument against immunity in its entirety. The defense reflects a general recognition that, by his elevation to the bench, a judge cannot always rise above the frailties he shares with those individuals the proriety of whose conduct he is now called upon to judge. If similarly situated litigants were always similarly judged, perfect procedural justice would obtain. This, however, is not the world in which we find ourselves. Doctrines such as judicial immunity are needed to promote the effective administration of our legal system, and in attempting to fashion a system of "justice for all" we cannot guarantee justice for each. The

meritorious claims of some who are adversely affected by improper judicial decisions are swept aside with the meritless ones. The tribute thereby exacted is a consequence of having human acts judged by human actors.

The defense, however, will not protect a judge from his intemperate acts in every instance. Only when his conduct occurs in a context in which even the properly motivated judge would be reluctant to act without protection from a civil-damage action and when that reluctance would undermine the integrity of the general process of judicial administration is immunity appropriate. This is such a case.

To summarize, we hold that the defendant's decisions to demote and dismiss the plaintiff were judicial acts performed within the scope of his authority. He is then, under the facts of this case, entitled to the defense of judicial immunity. We, of course, express no opinion on other decisions relating to Judge White's staff or even to probation officers in a different court system, because it must be determined in each case that the grant of immunity advances the policies behind it. We have, as we must, addressed only the facts of the case before us.

III

For the reasons stated above, the judgment of the district court is AFFIRMED.

POSNER, *Circuit Judge*, dissenting. Section 1 of the Civil Rights Act of 1871 (now 42 U.S.C. § 1983) creates a federal tort remedy against persons who violate federal rights under color of state law. The state does not mention immunity or other defenses to liability, but this just shows (as is anyway obvious) that the statute was not intended to be a complete code of tort liability. Procedures, remedies, defenses have to be grafted on; whether one calls the process of completing the statute interpretation, or common law elaboration, or policymaking (see *Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., dissen-

ting)), the objective is the same—to integrate the statute into a system of liability and remedies in which due regard is paid to all relevant considerations, including the impact of liability on the performance of essential public functions.

Today my brethren hold that a state judge can never be made to pay damages for firing a probation officer in violation of the officer's constitutional rights; the judge's immunity is absolute. My brethren emphasize that a judge exposed to the threat of being sued for damages may hestitate to fire an incompetent probation officer, and that the public will suffer from his hesitation. Most members of a judge's staff serve for a short time (this is true of most law clerks), do not perform essential services, or lack discretionary authority. So in the generality of cases the harm to the public if a judge is inhibited by fear of being sued from firing an incompetent staff member is clearly not great enough to justify giving him absolute immunity from suit. But in the case of probation officers and other judicial or quasi-judicial employees who are selected by judges—such as (in the federal system) magistrates and bankruptcy judges—the harm to the public if a judge is led to retain an unqualified employee by fear of being sued could be very serious.

Forceful as this point is, it does not justify giving judges absolute immunity from liability for firing a probation officer in violation of the Constitution, even when the point is combined with another that my brethren but hint at. There are administrative and judicial remedies, particularly under Title VII of the Civil Rights Act of 1964, as amended in 1972 to cover public employers, see 42 U.S.C. §§ 2000e(a), (b), 2000e-2(a), for some forms of employment discrimination by such employers, so that granting a state judge absolute immunity for such discrimination would not leave his victims completely without remedy. The second point is incomplete; the probation officer would have no remedy if he were fired for an unconstitutional reason for which Title VII or other statutes provided no remedy against the employing agency. The deeper problem is that both

points are applicable to a wide range of official conduct that has been held not to be protected by absolute immunity: a police chief's decision to fire a police lieutenant, for example.

Indeed the reasoning of the majority opinion extends to every consequential employment decision by every government official. The opinion cannot logically be confined to firing, although it carefully avoids any reference to failing or refusing to hire. Hiring an unqualified person because of fear that one might otherwise be sued for discrimination is no different from firing an unqualified person because of the same fear. It would be a curious notion that a judge must hire probation officers without regard to their race or sex but is free to fire them on the basis of their race or sex. The majority opinion cannot logically be confined to the hiring and firing of probation officers or other judicial or quasi-judicial personnel, either. Incompetent employees of other branches of government besides the judicial can do just as much harm to the public; and it does not follow that because a probation officer can be said to perform quasi-judicial acts, firing that officer is a judicial act, even if it is done by a judge. Finally, the emphasis that my brethren place on the confidential nature of the relationship between judge and probation officer would be relevant only if the judge were charged with having fired the probation officer on political grounds. See, e.g., *Soderbeck v. Burnett County,* 752 F.2d 285, 288 (7th Cir. 1985). Even then it might very well not be determinative. See, e.g., *Branti v. Finkel,* 445 U.S. 507 (1980) (assistant public defender).

In a society that prides itself on subjecting even its highest officials to the restraints of law (see, e.g., *Butz v. Economou,* 438 U.S. 478, 506 (1978)), a position historically novel and still far from universal, the grant of absolute immunity from civil liability—immunity, that is to say, from such liability even for deliberate wrongdoing—must be confined to situations where such immunity is not merely convenient but essential. *Id.* at 507. And in deciding whether this demanding test has been met

federal judges must be sensitive to the accusation of arbitrarily exempting themselves from liabilities which they have imposed in the name of the Constitution on other public officials, state and federal. The present case concerns state judges sued under section 1983 but its logic applies with equal force to federal judges sued directly under the Constitution. It thus engenders tension with *Davis v. Passman,* 442 U.S. 228 (1979). The Supreme Court held in that case that a Congressman could be sued for damages directly under the Constitution for firing his deputy administrative assistant because she was a woman. Although the Court reserved certain immunity questions, it said that "if petitioner is able to prevail on the merits, she should be able to redress her injury in damages." *Id.* at 248. The same thing can be said about a probation officer fired by a judge. It is true that the District of Columbia Circuit held recently that the Constitution's "speech and debate clause" (Art. I, § 6) immunizes members of Congress from liability in damages for firing an employee whose "duties are an integral part of the legislative process." *Browning v. Clerk,* No. 85-5144, slip op. at 12 (D.C. Cir. April 25, 1986). But even if this holding is correct, it is correct in virtue of an explicit constitutional provision that has no counterpart so far as judges are concerned; and we are not authorized to repair the oversights of the Constitution's framers.

As my brethren recognize, the purpose of absolute immunity is not to make life easy for officials of any branch of government; it is not to foster judicial peace of mind. We must not allow our vocationally sharpened sensitivity to the difficulties of performing judicial duties in this contentious era to influence us to immunize ourselves and other judges from the legal hazards of public office. The only tenable rationale of absolute immunity is the need to protect officials from being seriously deflected from the effective performance of their duties. Absolute immunity is strong medicine, justified only when the danger of such deflection is very great. Analysis thus requires careful attention to the tradeoffs involved in a judgment to grant absolute

immunity. A lawsuit imposes costs even on a prevailing defendant, who generally cannot recover his attorney's fees; in addition some defendants who ought to win their suits lose them simply because the judicial system like most other human institutions makes mistakes. So every individual has an incentive to avoid conduct that will get him sued; but the conduct he avoids may be conduct that promotes the welfare of society, and if so the incentive will have socially costly consequences. These costs have to be balanced against those of letting wrongdoers get off scot-free. Ordinarily the latter costs are thought greater but not when (1) the nature of the potential defendant's job is such that he can be expected to be sued constantly, (2) most such suits will be frivolous, (3) the defendant can reduce the probability of being sued by taking measures to avoid exposure to suit, (4) those measures are, however, socially costly because of the nature of the defendant's work, and (5) the victims of his wrongdoing have other remedies.

These conditions coalesce in the case of a judge sued for judicial rulings, or a prosecutor for decisions whether to prosecute, or a legislator for legislation — and judges, prosecutors, and legislators, and officials acting in these capacities though not called such (including ad hoc judges, such as jurors), are (apart from the President of the United States) the principal officials who enjoy absolute immunity from federal civil liability. See, e.g., *Cleavinger v. Saxner*, 106 S. Ct. 496, 500 (1985); *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2812 (1985); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-36 (1980). Witnesses are absolutely immune for similar reasons. The absolute immunity of judges from civil liability for their rulings has been an established principle of Anglo-American jurisprudence for hundreds of years. See, e.g., *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-54 (1872), and cases cited there; Note, *Pulliam v. Allen: Delineating the Immunity of Judges From Prospective Relief*, 34 Cath.U.L.Rev. 829, 838-43 (1985). It was held applicable to suits under section 1983 in *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). But there is

nothing in this history to suggest that judicial immunity extends beyond judicial rulings.

The business of a judge is to rule against people. Every contested case has a loser, ofter a sore one. And the class of litigious people is of course overrepresented in litigation, meaning that the loser of a lawsuit is more likely (if permitted) to vent his anger by bringing another lawsuit than would the average loser of a nonlegal contest. A judge of this court votes in more than 200 cases a year, and every (nondissenting) vote produces a loser. A significant fraction of the losers would sue the judges if they could do so (some sue us despite our absolute immunity). The vast majority of such suits would be frivolous, for they would be efforts to attack a final judgment collaterally by attacking the judge, a mode of collateral attack that would not be tolerated even if judges were not completely immune from being sued for damages for their judicial rulings. Nevertheless these suits would be costly in the aggregate and could lead to measures of avoidance of various sorts. Some people would decline to become judges, though well qualified. Others would pull their punches in cases where one of the litigants seemed particularly irate or contentious. Others would try to duck cases involving such litigants. For none of these techniques of avoidance would there be effective remedies. People who are scared of being sued cannot be forced to serve as judges. Nor will taxpayers raise judicial salaries high enough to compensate judges for running the grave litigation risks they would run in having to judge without immunity from liability for their rulings. And because judges exercise great discretion (despite the pious insistence that ours is a government of laws not men), judicial timidity is hard to prove and even harder to punish. Many judges, including all federal judges, are beyond the power of correction by the political branches of government and thus can pull their punches to their hearts' content. Finally, the victim of a wrongful judicial ruling ordinarily has a remedy by way of appeal to a higher court.

The case for granting judges absolute immunity for their judicial rulings is thus a powerful one, but one not easily transposed to judges' decisions on staffing their chambers. Consider the compact statement of the rationale for absolute judicial immunity in *Pierson v. Ray, supra:* "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that are brought before him, including controversial cases that arouse the most intense feeling in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." 386 U.S. at 554. Notice how the entire discussion is geared to the judge's role in making judicial decisions. If there is a case for absolute immunity from civil liability for judges' employment decisions, it is a completely different case from the traditional one. The decision today breaks new ground; and novelty is not always a virtue in law.

Absolute immunity as traditionally conceived (I mean the judge-made doctrine, not the absolute immunity that federal legislators enjoy by virtue of the speech and debate clause in Article I) is limited to the situation where an official's position requires that he be constantly hurting members of the public—so that if he is not immune he will be a constant target of litigation—and where in addition massive litigation or its threat is likely to distort his official behavior, to the serious detriment of the public. This describes the position of judges in rendering judicial decisions and of prosecutors in prosecuting. But no one thinks that a state or federal district attorney should be absolutely immune from liability for discriminating in the hiring or firing of assistant district attorneys; and why should there be a different rule for judges who discriminate in hiring or firing their subordinates? A district attorney may be responsible for initiating hundreds or even thousands of prosecutions in the course of a year, and every one would be a potential lawsuit

against him if it were not for absolute immunity. Prosecutors enjoy a broad, essentially unreviewable discretion in deciding whom to prosecute, while judges enjoy a broad discretion, too—discretion to decide cases plausibly for either party. Many judges (all federal judges) are in addition protected from removal by the other branches of government. If either type of official is made timid by fear of being sued and his performance suffers as a result, the public will not be the wiser; even if it is, it may not be able to do anything to whip the official back into line. But a prosecutor or judge is not more likely to be sued for employment discrimination than any other employer, public or private. Cf. *Mitchell v. Forsyth, supra,* 105 S. Ct., at 2813. He does not face an avalanche of lawsuits if absolute immunity is denied; and his employment decisions are, if not fully subject to outside evaluations, less inscrutable than prosecutorial and adjudicative decisions, or at least no more inscrutable than the employment decisions of other officials.

It is true that so far as potential exposure to suit by members of the public is concerned, a policeman is in much the same position as a judge or prosecutor yet enjoys no absolute immunity from civil damage actions. There are reasons for the difference in treatment. One, which is merely realistic, is that a policeman rarely has sufficient assets to be worth suing (of course this is also true of many assistant district attorneys), unless he is indemnified by his employer—in which event the suit is unlikely to have much impact on his performance of his duties. The threat of suit is less likely to affect the performance of his duties for another reason as well: he has less discretion than a judge or prosecutor. He is also more amenable to discipline and control by his superiors if he seems to be flagging. Finally, unless policemen can be sued for using excessive force or for false arrest, many victims of these excesses will be without any remedy. In contrast, judicial decisions are subject to appeal and prosecutorial decisions are subject to correction by grand juries, petit juries, trial judges, and appellate judges.

Granted, a public employee who has been fired may have alternative remedies to a suit for damages, a fact that might seem to make him more like the loser of a lawsuit than like the victim of police brutality. A probation officer fired on grounds of race or sex has no right of appeal but does have administrative and judicial remedies against the employing agency (i.e., the court rather than the judge). These remedies are limited, most importantly in allowing only equitable relief: the fired employee can get reinstatement with back pay but cannot get common law damages. But the loser of a lawsuit cannot get common law damages either; he can only get a reversal on appeal. In any event, the absolute immunity of judges cannot be made to depend on the accident that a legislature has created an alternative remedy, for it is not something that distinguishes a judge from any other public employer.

If I did not have absolute immunity for my judicial rulings I would be enveloped in a cloud of litigation that my estate would still be defending long after my death. But I have never thought I had absolute immunity for employment decisions, including decisions on bankruptcy judges in which I participate as a member of the Seventh Circuit's Judicial Council. Judges do not need such an immunity in order to perform their duties effectively. Without it there may be some diminution in our effectiveness but not enough to justify absolute immunity if I am right that it can be granted consistently with our traditions only when the circumstances are compelling. Some evidence that we need not fear a flood of lawsuits if the district court's decision is affirmed is that this appears to be the first case in which a judge's absolute immunity from damage liability for employment discrimination has even been argued at the federal appellate level; it was not argued in *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 545-46 (8th Cir. 1984), where the Eighth Circuit recently upheld a damage judgement against a state judge for removing a hearing officer because of her sex. That case might have been decided differently if a litigant had sued the judge for having fired the hearing officer, for in rela-

tion to litigants the employment decisions of judges may be the sort of judicial act to which absolute immunity attaches; but in relation to the employee or job applicant, employment discrimination by a judge does not engage the policy behind the doctrine of absolute judicial immunity.

The failure to distinguish carefully among the different kinds of acts that judges perform is, indeed, the fatal weakness in the majority opinion. Carried to its logical extreme, the opinion would attach absolute immunity to any major decision made by a judge within the scope of his lawful powers. The proper question is whether the decision was made in the judge's judicial capacity. Judges have both judicial and executive functions. The basic distinction is well established in the cases. See *Stump v. Sparkman,* 435 U.S. 349, 362 (1978); *Lopez v. Vanderwater,* 620 F.2d 1229, 1233-35 (7th Cir. 1980); *Harris v. Deveaux,* 780 F.2d 911, 914-16 (11th Cir. 1986); *Dykes v. Hosemann,* 776 F.2d 942, 945 (11th Cir. 1985) (en banc) (per curiam); *Holloway v. Walker,* 765 F.2d 517, 522-25 (5th Cir. 1985); *Richardson v. Koshiba,* 693 F.2d 911, 913-15 (9th Cir. 1982); Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?,* 53 Fordham L. Rev. 1503 (1985). As the Ninth Circuit said in *Gregory v. Thompson,* 500 F.2d 59, 65 (9th Cir. 1974), where the defendant, a judge, had forcibly expelled the plaintiff from the judge's courtroom, "Judge Thompson's choice to perform an act similar to that normally performed by a sheriff or bailiff should not result in his receiving absolute immunity for this act simply because he was a judge at the time." See also *Ammons v. Baldwin,* 705 F.2d 1445, 1448 (5th Cir. 1983). Or as we said in both *Lowe v. Letsinger,* 772 F.2d 308, 311-12 (7th Cir. 1985), and *Glick v. Gutbrod,* 782 F.2d 754, 756 (7th Cir. 1986) (per curiam), "The doctrine [of absolute immunity] applies to damage claims, ... but not to ministerial or administrative acts."

I realize that the line between the judicial and the administrative is not hard and fast; the rulings that a judge makes in the course of "administering" a school system or prison

system under a consent decree are entitled to absolute immunity. *Holloway v. Walker, supra,* 765 F.2d at 525. I recognize the hint—no more—in *Richardson v. Koshiba, supra,* 693 F.2d at 914 n. 10, that the classification of the act is determined by the office of the actor rather than the nature of the act. I realize that the cases I have cited are not factually similar to the present one—except for one, but as it is a decision of the Supreme Court, though an old one, we should pay particular attention to it. In *Ex Parte Virginia,* 100 U.S. 339 (1880), a county judge was indicted for racial discrimination in slecting jurors to serve in the county's courts. To the judge's argument that he was immune from such a prosecution the Court answered in words applicable to the present case, "Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. . . . That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc," *id.* at 348—and probation officers. This was said in the context of a criminal prosecution but it would be surprising if a suit for civil damages brought by the prospective jurors whom the judge had discriminated against would have been deemed barred by the doctrine of absolute immunity.

My brethren would give judges more protection than other officials not because of the acts that they do which are distinctively judicial (for I contend that firing a subordinate, even a judicial subordinate, is not a distinctively judicial act) but just because they are judges. The same racial or sexual or age discrimination in firing a probation officer is to be immunized from civil liability if the person doing the firing is a judge, and is not to be immunized if the person is another probation officer, or some other executive officer, or a judicial administrator, or in short anyone who does not himself perform—though of course not in the act of hiring or firing—a judicial function.

So I think my brethren are wrong to grant Judge White absolute immunity, and I would reverse the judgment of the district court. But I also think that the protection against suit that the majority opinion creates is illusory. The majority is so intent on writing a narrow opinion that it leaves the scope of its new doctrine of absolute immunity entirely uncertain. Can it really be that the doctrine is to be limited to the firing of probation officers in Illinois juvenile courts? The logic of the opinion cuts a much broader swath, but judges cannot be (perhaps should not be) forced to apply principles in their full logical reach. The majority calls for "a critical evaluation of the concerns underlying the defense" of absolute immunity in each case; it declines to express any "opinion on other decisions relating to Judge White's staff or even to probation officers in a different court system, because it must be determined in each case that the grant of immunity advances the policies behind it." It is right for judges to be cautious when they set sail on uncharted seas, but in the field of immunities this may be a reason for not leaving port in the first place. The absolute immunity for a judge's legal rulings is about as definite a rule as we have in our legal system, and the absolute immunity that the court creates today is about as indefinite, which robs the principle of its value to the judges and to the public. Absolute immunity provides real security only if the scope of the immunity is well defined. Under the court's approach the process of definition will be protracted and may never yield a clear rule on which employees or job applicants may sue which judges and which may not, and for what. We shall still have to buy liability insurance.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois
June 5, 1986

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. WILLIAM H. TIMBERS, Senior Circuit Judge*

No. 84-1823

CYNTHIA A. FORRESTER,
Plaintiff-Appellant,

vs.

JUDGE HOWARD LEE WHITE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.

No. 82 C 3231

Gerald B. Cohn, Magistrate

JUDGMENT — ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Southern District of Illinois, East St. Louis Division, and was argued by counsel.

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* The Honorable William H. Timbers, Senior Circuit Judge for the Second Circuit, sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

No. 82-3231

CYNTHIA FORRESTER

vs.

JUDGE HOWARD LEE WHITE

Gerald B. Cohn, U. S. Magistrate

X Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered in favor of the plaintiff CYNTHIA FORRESTER, and against the defendant, JUDGE HOWARD LEE WHITE, on plaintiff's claim for discrimination in being demoted from Supervisor to Intake Worker.

IT IS FURTHER ORDERED that Judgment is hereby entered in favor of the plaintiff and against the defendant on plaintiff's claim for discrimination in her termination from employment.

IT IS FURTHER ORDERED that on Plaintiff's claim against the Defendant for discrimination in the termination of her employment, damages are assessed as follows: (1) the value of wages lost minus plaintiff's interim earnings and unemployment compensation — $23,555.00; (2) the value of pension con-

tributions lost — $2,106.80; (3) the value of credits to be applied for reduction of student loans which were lost — $407.00; (4) the value of reasonable expenses incurred by plaintiff in her search for employment — $750.00; (5) the humiliation and embarrassment experienced as a result of defendant's conduct — $35,000.00; the anxiety, pain and suffering experienced as a result of defendant's conduct — $15,000.00, for a total of $76,818.80 as to that claim.

IT IS FURTHER ORDERED that on Plaintiff's claim against the defendant for discrimination in being demoted, damages are assessed as follows: (1) the humiliation and embarrassment experienced as a result of defendant's conduct — $3,800.00; (2) the anxiety, pain and suffering experienced as a result of defendant's conduct — $1,200.00.

Clerk, A. Marvin Helart, Clerk

By /s/ Sandra Pannier
Deputy Clerk

Date: January 10, 1984

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CIVIL NO. 82-3231

CYNTHIA A. FORRESTER,
Plaintiff,

vs.

HOWARD LEE WHITE,
Defendant.

ORDER

Before the Court is the defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, filed on January 20, 1984, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The plaintiff has responded with a Memorandum in Opposition to said Motion.

We note at the outset that all parties have consented to the final entry of judgment in this case by a United States Magistrate, pursuant to 28 U.S.C. § 636(c). An Order of Reference to this effect was entered by Chief Judge James L. Foreman on November 29, 1983.

For the reasons fully stated below, the defendant's motion for judgment notwithstanding the verdict is denied, but the motion for a new trial is granted.

— — — — — —

This action was originally filed by Cynthia A. Forrester against various defendants who were alleged to have violated the plaintiff's right to be free from discrimination in employment on the basis of sex. The plaintiff was employed to do juvenile intake and probation work in the Circuit Court of Jersey County and for a period was the supervisor of the unit.

In the Complaint, the plaintiff claimed that she was discriminated against on the basis of her sex in three areas: the setting of her salary; her demotion from supervisor of the unit to intake worker; the termination of her employment. The plaintiff has abandoned the first of these three claims. The plaintiff sought both monetary relief and reinstatement to her prior position.

The plaintiff brought the action pursuant to Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000e *et seq.*), as well as pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. The jurisdiction of this court was not disputed.

The Title VII action against defendants White, the Seventh Judicial Circuit and Jersey County were tried simultaneously with the Section 1983 action against Judge White alone. The Section 1983 case was tried by a jury, the Title VII case was non-jury. A jury verdict was rendered on January 6, 1984, in favor of the plaintiff and against defendant White on the issue of liability in the Section 1983 action. A verdict was then rendered on January 9, 1984, assessing damages against White in the total amount of $81,818.80. The Court entered a judgment on the verdict on January 10, 1984.

Subsequently, all parties filed a stipulation for dismissal of the Title VII case, and on February 7, 1984, this Court entered an Order of Dismissal stating that the plaintiff's Title VII claim against Jersey County, Illinois, the Seventh Judicial Circuit, and Judge Howard Lee White are dismissed with prejudice.

Therefore, as the plaintiff notes in her Memorandum filed with this Court on January 30, 1984, "Judge Howard Lee White is the sole remaining defendant in the lawsuit. The claim against him is pursuant to 42 U.S.C. § 1983."

We turn now to the pending motion. As noted above, this is defendant White's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

The plaintiff was hired as Juvenile Probation Officer and Director of Court Services for the Jersey County Circuit Court on April 4, 1977. On July 1, 1979, plaintiff became Project Supervisor for the Jersey County Juvenile Court Intake and Referral Services Project. Judge Howard Lee White, as Project Director, hired plaintiff and supervised her work. This Project was operated pursuant to a grant made to Jersey County by the Illinois Law Enforcement Commission. The County was the grantee under the Project and it controlled the expenditure of the funds.

Defendant Howard Lee White at all times material herein was and is a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois, serving as Presiding Judge of Jersey County, Illinois. The Chief Judge of the Seventh Judicial Circuit or his designee has the authority under Illinois law to hire and fire Juvenile Court Probation Officers pursuant to Ill. Rev. Stat. 1981, ch. 37 § 706-5. Defendant White at all material times herein acted as the designee of the Chief Judge of the Seventh Circuit for purposes of the hiring and firing of Juvenile Court Probation Officers in Jersey County, Illinois.

Joseph Jurkainin was hired by defendant White as the Intake Worker for the Project and began his employment on July 1, 1979. The facts disclose that White consulted with the plaintiff before the hiring of Jurkainin.

After approximately six months on the job together, the plaintiff and Jurkainin experienced a number of conflicts. This involved office rules and procedures, but basically seemed to be a personality clash. This resulted in the plaintiff making a continuous stream of complaints to the defendant about Jurkainan.

Testimony established that White made an independent investigation of the complaints from plaintiff by talking to other courthouse personnel who worked with the plaintiff and Jurkainin. In January, 1980, the plaintiff complained to the

defendant about Jurkainin. Defendant White told the plaintiff she could fire Jurkainin herself. The plaintiff admitted this fact, but chose not to fire Jurkainin. This offer by the defendant was one fact among many at trial which constituted significant evidence that it was not sex discrimination which caused the defendant to later fire the plaintiff. Rather, it is clear that, among other things, the defendant had simply become exasperated over the plaintiff's inability to effectively manage her subordinate, Mr. Jurkainin. There was simply no evidence of an 'good ol' boy system" or anything of the sort between White and Jurkainin — as evidenced by the fact that at one point the defendant told the plaintiff to simply fire Jurkainin if she couldn't deal with him. The plaintiff testified that her reason for not doing so was based upon her concern that it would be a blemish on her record as a supervisor.

Despite this, after January, 1980, the plaintiff continued to complain to defendant White that Jurkainin was not doing his job. By this time White was naturally concerned that the fault might lie with tne plaintiff, and not with Jurkainin. Thus, White did not act upon plaintiff's further requests that Jurkainin be terminated.

By July of 1980, White was clearly upset about the plaintiff's failure to resolve her problems with Jurkainin and stated that he was "tired of babysitting" for the Juvenile Probation Office. Thus, defendant White requested that both the plaintiff and Jurkainin submit their resignation to him directly unless they were able to resolve their problems. Both plaintiff and Jurkainin advised defendant White that they would carry on in a professional manner in the future.

Defendant White then requested that the plaintiff submit to him other alternatives as to how to handle the problems in the Juvenile Probation Office. Plaintiff submitted in writing two (2) suggestions to defendant White for resolving the problems in the Juvenile Probation Office:

(1) Fire Jurkainin, or

(2) Split the office in two.

After the submission of the two (2) suggestions, defendant White asked the plaintiff to think about some more suggestions and submit them to him. Plaintiff failed to submit any further suggestions to the defendant. Defendant White chose to split the office in two rather than fire Jurkainin. White advised the plaintiff that she would no longer be responsible for supervising Jurkainin; however, the plaintiff was not relieved of her duties as Project Supervisor.

Jurkainin continued to submit his work for approval of the plaintiff for a period of time until he realized she returned it directly to him as soon as it was submitted.

It should be noted that the plaintiff's salary was not reduced in any manner or form in July of 1980. Plaintiff's title under the grant never changed.

The Plaintiff failed to prepare the monthly reports as required pursuant to the Illinois Law Enforcement Commission grant after July, 1980. When questioned by the defendant as to the preparation of the reports, plaintiff advised defendant that she would not do the reports as he had relieved her of her supervisory duties. Clearly, the plaintiff knew that defendant White was not pleased with her failure to comply with the grant requirement for monthly reports. Plaintiff advised defendant White that she would teach a secretary how to do the monthly reports.

This Court firmly believes that the above-noted sequence of events constitute significant evidence that defendant White had a "non-discriminatory" reason for being dissatisfied with the plaintiff's work performance. Defendant White gave the plaintiff the opportunity to fire Jurkainin. Due to concern over her managerial reputation, the plaintiff chose not to do so. Although defendant White acquiesced in this decision, the

plaintiff clearly must take responsibility for her subsequent failure to bring the situation under control.

Evidence at trial established that White had yet another "non-discriminatory" reason to terminate the plaintiff's employment. In March, 1980, the plaintiff took two (2) weeks vacation from her job. Plaintiff was entitled to two (2) weeks vacation each year. Beginning in August of 1980, the plaintiff began taking off about one day per week compensatory time. The plaintiff had been advised previously by the defendant that the courthouse rules of Jersey County concerning compensatory time did not apply to her. Defendant White had advised the plaintiff on numerous prior occasions that he did not mind if she took a few hours off if she had spent a few hours in overtime the previous day or night; however, the compensatory time was not cumulative. Defendant White allowed plaintiff to take time off to continue her education.

The grant from the Illinois Law Enforcement Commission did not have a specific provision regarding compensatory time, but stated merely that:

> [c]onsideration and flexibility of hours will depend on the number of "on call" hours actually worked. The intake worker will be on call twenty-four hours a day. However, if he/she requires calls and work on cases during non office hours, compensation will be left to the discretion of the Project Supervisor in accordance with current policy for the local probation office.

During August and September, 1980, plaintiff worked no overtime whatsoever and her caseload declined substantially. Plaintiff never advised defendant White that she planned to take a vacation in the month of October, 1980. The office calendar for the Jersey County Juvenile Probation Office for the month of October, 1980, indicated the following: "Cindy — Comp. day" on October 3, October 6, October 7, October 8, October 9 and October 10, 1980. Plaintiff's personal calendar

for the month of October, 1980, indicated: "Cindy — Comp. day" on October 3, October 6, October 7, October 8, October 9 and October 10, 1980. On September 30, 1980, defendant White saw the notations on the Jersey County Juvenile Probation Office calendar and advised Jurkainin and plaintiff to see him the next day in his chambers.

Defendant White at this time requested that the plaintiff explain to him her understanding of comp time. Plaintiff advised defendant White that "it was in the grant." Defendant White asked plaintiff to get the grant. Plaintiff replied that Jurkainin should get the grant. Defendant White produced a copy of the grant himself. Defendant White asked plaintiff how she planned to take six (6) days of comp time in October, 1980. Plaintiff told defendant White that she was entitled to approximately 477 hours of retroactive comp time, calculating her overtime hours worked since July 1, 1979. Defendant White advised plaintiff she did not have comp time as such. Defendant White advised plaintiff that if she insisted on taking the six days in October, 1980, as comp time off he would terminate her employment. The plaintiff advised defendant White that she intended to take the six comp days off in October, 1980. This clearly amounted to insubordination. Defendant White told plaintiff she was terminated. Plaintiff told defendant White "[y]ou can't fire me." Defendant White advised plaintiff she was fired and told Jurkainin to go with her to the Juvenile Probation Office so she could collect her personal belongings.

Based on these facts, were the Title VII count still before this Court, we would find that the plaintiff has clearly failed to sustain her burden of proof in proving that her demotion and termination were motivated by a discriminatory intent on the part of defendant White, or that sex was a factor in the decision to demote and terminate her.

The plaintiff points to some evidence before the jury which plaintiff believes could have justified an inference of sex discrimination. Although this Court is not convinced, we have

decided to deny the defendant's motion for judgment notwithstanding the verdict, and rather grant the defendant's motion for a new trial. We believe that in so doing we are giving the plaintiff the benefit of the doubt:

> [a] judge may set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence that is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice.

Atlantic and Pacific Stores, Inc. v. Pitts, 283 F.2d 756 (4th Cir. 1960).

A motion for judgment notwithstanding the verdict "can be granted only if the motion for directed verdict should have been granted." *Walker v. KFC Corp.,* 515 F. Supp. 612, 615 (S.D. Cal. 1981). Defendant did not entirely convince this Court that a directed verdict should have been granted; therefore, the motion for judgment notwithstanding the verdict will be denied.

This Court has greater latitude in considering defendant's alternative motion for a new trial: "Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice. It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so." 11 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2803 (1973). A new trial may be ordered for a great variety of reasons:

> [i]t has been said that the general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair, and that the motion may also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions.

Id. § 2805. *See also Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972) (court may order new trial if first trial resulted in a miscarriage of justice), *cert. denied*, 410 U.S. 930 (1973). "[W]here the trial court finds the verdict contrary to the weight of the evidence and grants a new trial...the appellate court should 'exercise a closer degree of scrutiny and supervision...in order to protect the litigants' right to jury trial.' " *Id.*, 466 F.2d at 187 [quoting *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d. Cir.), *cert. denied*, 364 U.S. 835 (1960)]. On the other hand:

> [W]hen evidence is erroneously admitted or excluded or where the trial court has erred in the instructions to the jury, the trial court is considered in a better position to correct a manifest injustice in ruling on the motion for new trial. Under these circumstances the grant of the new trial does not interfere with the role of the jury as the trier of fact.

Fireman's Fund, 466 F.2d at 186. The trial court is also in the best position to determine whether the verdict is excessive; one Court of Appeals has noted that

> inadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is a "plain injustice" or a "monstrous" or "shocking" result.

Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401, 410 (8th Cir. 1976) (quoting *Solomon Dehydrating Co. v. Guyton*, 294 F.2d

439, 447-48 (8th Cir.), *cert. denied,* 368 U.S. 929 (1961). The Seventh Circuit agrees that the judge has discretion to set aside a verdict as excessive. *Collum v. Butler,* 288 F. Supp. 918 (N.D. Ill. 1968), *aff'd* 421 F.2d 1257 (7th Cir. 1970).

In addition to granting a new trial because the verdict was against the weight of the evidence, we stress that the damages were, in fact, excessive, and also that in a new trial more appropriate instructions will be provided on the Fourteenth Amendment issue.

Concerning the excessive damages, it is the opinion of this Court that the $35,000.00 assessed by the jury for humiliation for discharge was simply unreasonable. There was only limited evidence of alleged humiliation. We note that the plaintiff had sufficient self confidence to run for Sheriff of Jersey County against the incumbent Sheriff a short time thereafter.

There is other evidence that the jury was tainted by prejudice or emotion. Absolutely no evidence was presented to the jury on expenses related to search for employment. Plaintiff's counsel did not even argue for the award after she failed to present even one word of evidence from the plaintiff on these alleged expenses. Considering this, the jury award of $750.00 was simply unreasonable.

Finally, the Court failed to instruct the jury properly on the Equal Protection Claim. Neither party requested a specific instruction in this regard. This was understandable, since the plaintiff's claim under 42 U.S.C. § 1983 was based primarily on the Title VII claim. This Court has now determined, however, that defendant White cannot be sued directly under Title VII. White is not an "employer" under Title VII, according to the requirements stated in 42 U.S.C. § 2000e(b). Thus, we would dismiss a Title VII claim for want of jurisdiction. *Burke v. Friedman,* 556 F.2d 867 (7th Cir. 1977).

Since Judge White cannot be sued directly under Title VII, he cannot then be sued under 42 U.S.C. § 1983 which is based

upon a violation of Title VII. *Huebschen v. Department of Health and Social Service,* 716 F.2d 1167 (7th Cir. 1983). Of course the plaintiff can still use her initially plead Equal Protection Claim under the Fourteenth Amendment as the basis for the Section 1983 action. In order to do so, however, the plaintiff must prove that defendant White is responsible for purposeful and "intentional" acts of discrimination. *Washington v. Davis,* 426 U.S. 229 (1976). A definitional "intent" instruction was given to the jury but was never tied to the issues instruction. The issues instructions as submitted to the jury in the instant case recite the necessary elements to prove a Title VII claim, not an Equal Protection Claim. Nowhere in the instructions does it state that the defendant must commit purposeful, intentional acts of discrimination. Thus, the instructions are simply inadequate to support an Equal Protection Claim. A jury must be properly instructed on the applicable legal standard before it can fairly perform its function. *Tyler v. Dowell, Inc.,* 274 F.2d 890 (10th Cir. 1960), *cert. denied,* 363 U.S. 812.

For all of the above-noted reasons, taken together, this Court is convinced that the defendant's motion for a new trial must be granted.

THEREFORE, IT IS THE ORDER of this court that defendant's Motion for Judgment Notwithstanding the Verdict is DENIED and that defendant's Motion for a New Trial is GRANTED.

Dated this 16th day of March, 1984.

/s/ Gerald B. Cohn
United States Magistrate

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CIVIL NO. 82-3231

CYNTHIA A. FORRESTER,
Plaintiff,

vs.

HOWARD LEE WHITE,
Defendant.

ORDER

Before the court is the defendant's Motion for Summary Judgment, filed on March 30, 1984. The plaintiff filed a Memorandum in Opposition to said motion on April 11, 1984. A Motion Hearing was held before this Court, at which both parties advanced oral argument.

For the reasons stated below, the defendant's Motion for Summary Judgment is granted.

— — — — — — —

On March 16, 1984, this Court granted the defendant's motion for a new trial. As we noted in that Order, plaintiff's Title VII claims against Jersey County, the Seventh Judicial Circuit and Judge Howard Lee White were all dismissed with prejudice on February 7, 1984, pursuant to a Stipulation for Dismissal. Therefore, the plaintiff is left with a claim alleging a violation of the equal protection clause of the Fourteenth Amendment brought pursuant to 42 U.S.C. § 1983. Our Order of March 16, 1984, reviewed the facts and history of this case in some detail. We will not repeat these facts here, but rather will refer to them only to the extent necessary to clarify our resolution of the rather straightforward and narrowly defined single issue now presented by the defendant's Motion for Summary Judgment.

The defendant asserts that the plaintiff's instant suit, now brought pursuant to 42 U.S.C. § 1983, is barred because of the doctrine of judicial immunity. The defendant cites as primary authority the case of *Blackwell v. Cook*, 570 F. Supp. 474 (N.D. Ind. 1983). At the recent Motion Hearing the plaintiff conceded that were we to adopt the reasoning of *Blackwell*, we would be constrained to enter summary judgment against the plaintiff. The plaintiff admits that the facts are virtually identical. However, the plaintiff urges this Court not to adopt the reasoning of *Blackwell*.

As we note in some detail below, we have decided to grant the defendant's Motion for Summary Judgment for two reasons. First, our careful review of *Blackwell* indicates that the case was correctly decided by Chief Judge Sharp of the United States District Court for the Northern District of Indiana. Second, there is no basis for distinguishing between the relevant facts of the two cases.

As we noted in our Order of March 16, 1984, the plaintiff Cynthia A. Forrester, alleges that the defendant violated her right to be free from discrimination in employment on the basis of sex. The plaintiff was employed to do probation work in the Circuit Court of Jersey County, Illinois. Judge Howard Lee White hired her. Defendant White later fired her. Defendant White now seeks absolute judicial immunity from monetary damages for his actions, based upon the decision in *Blackwell*.

A review of the law preceding the *Blackwell* decision seems appropriate at this point.

Although not immunizing him from injunctive and declaratory relief, the Civil Rights Act did leave intact a state court judge's absolute immunity from monetary damages for the performance of a judicial act. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). The test to determine whether the doctrine of judicial immunity protects a judge from damages for a particular act is twofold; the leading case on this point states it as follows:

> . . . [T]he factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity. *Stump v. Sparkman,* 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331 (1978).

The *Blackwell* decision analyzed this two-part test in some detail, and the analysis appears to be a proper one. We adopt its reasoning.

The "nature of the act" half of the *Sparkman* test is not dependent of whether the complained of act took place outside the courtroom. Relying on *Sparkman,* the Seventh Circuit rejected a "place of the act" test saying,

> [T]hat a judge has no jurisdiction outside a courtroom is without merit. Valid judicial acts are often performed outside the courtroom. *Lopez v. Vanderwater,* 620 F.2d 1229, 1234 (7th Cir.), *cert. denied,* 449 U.S. 1028, 101 S.Ct. 601, 66 L.Ed.2d 491 (1980).

The *Lopez* opinion noted that essential judicial acts relating to decision-making would otherwise not be protected by the doctrine of judicial immunity if a "place-of-the-act" or "out-side-the-courtroom" test were to be adopted.

We turn next to the second part of the test. As *Blackwell* noted,

> [S]upervisory duties of the judge over persons involved in the judicial process do not defeat the other half of the *Sparkman* test, i.e., "did the person deal with the judge in his judicial capacity?" This is not a situation where the plaintiff was involved in an automobile collision with the defendant and the defendant is seeking to assert judicial immunity. Nor is it a situation where the judge is acting

> solely as an employer, e.g., hiring and firing a personal valet....

Blackwell v. Cook, 570 F. Supp. 474, 479 (N.D. Ind. 1983).

As *Blackwell* went on to note, the critical point here is the confidential relationship that exists between a probation officer and a judge. The nature of the judge-probation officer relationship makes it essential to the decision-making process.

In the case at bar, the defendant is the Circuit Judge of Jersey County, Illinois. Ill. Rev. Stat. 1983, Ch. 37, ¶ 706-5 states that probation personnel serve at the pleasure of the chief judge or his designee. The defendant hired plaintiff to be a juvenile officer for Jersey County and the plaintiff's duties were to investigate complaints against juveniles, make recommendations to the state's attorney, prepare presentence reports, etc. The plaintiff was hired and supervised by the defendant and no one else exercised authority or control over her. The plaintiff was a member of the defendant's personal staff.

Ill. Rev. Stat. 1983, ch. 37, ¶ 706-1 lists the functions and duties of juvenile probation departments which include the following:

1. Investigate and evaluate complaints indicating delinquency;

2. Assist and determine whether a complaint under the Juvenile Court Act will be filed with the state's attorney;

3. Conduct pre-hearing investigations and formulate recommendations to the court;

4. To counsel juveniles;

5. To supervise minors referred by the court;

6. Act as liasion officer between the court and agencies to which juveniles are referred;

7. To serve as guardian of a ward of the court;

8. Provide probation supervision as ordered by the court;

9. To arrange placements pursuant to court orders;

10. To assume administrative responsibilities for such detention or other institutions for juveniles as the court may operate;

11. To maintain adequate records and to make reports to the court;

12. To perform such other services necessary to implement the law or as directed by the court.

The similarities between *Blackwell* and the case at bar are significant. Both cases involve probation personnel with at least substantially similar duties as prescribed by state law and actual work experience. In both states these probation personnel work at the pleasure of the judge who also supervises them and possesses the authority to hire and fire them. In both instances, the probation personnel enjoy a very confidential relationship with the judge and play a very large and important role in the judicial process.

In conclusion, we believe that the *Blackwell* case was correctly decided. We have examined the case cited by *Blackwell,* and have compared the facts of the instant case to those in *Blackwell.* In the end, however, much rests on a sound public policy determination: should absolute judicial immunity for monetary damages be extended to the facts of this case? Precedents drawn from closely related circumstances suggest that it should be.

For example, the United States Court of Appeals for the Fifth Circuit has not confined the grant of absolute judicial immunity to the narrow situation of the judge deciding a given case. Rather, the Fifth Circuit refers to the "judicial phase of the

criminal process." Discussing the immunity of probation officers, the court noted

> Judges who act within the scope of their authority enjoy absolute immunity from damage suits. (citations omitted) ... We hold that a probation officer is entitled to the same protection when preparing and submitting a presentence report in a criminal case. The report is an integral part of the sentencing process, and in preparing the report the probation officer acts at the direction of the court. *See* Fed. R. Crim. P. 32. We think it apparent that this narrow function is "intimately associated with the judicial phase of the criminal process" ... (citations omitted).

Spaulding v. Nielson, 599 F.2d 728, 729 (5th Cir. 1979).

Similarly, the defendant should properly be provided with absolute immunity from damages in the instant case. As noted in *Blackwell*,

> [t]he nature of the judge-probation officer relationship ... shows that it is essential to the decision making process. Although there is a supervisory aspect to this relationship, it does not in any way minimize the judicial character of the roles both individuals perform...[The probation officer] has dealt with the Circuit Court in its capacity as a judge and has aided it in the performance of judicial acts. As a result, her prayer for damages growing out of those acts and relationships has no support in light of the doctrine of judicial immunity under 42 U.S.C. 1983."

Blackwell v. Cook, 570 F. Supp. 474, 478-79 (N.D. Ind. 1983).

Therefore, for the reasons stated above, the defendant's Motion for Summary Judgment is GRANTED.

Dated this 13th day of April, 1984.

/s/ Gerald B. Cohn
United States Magistrate

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 11, 1986

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. WILLIAM H. TIMBERS, Senior Circuit Judge*

No. 84-1823

CYNTHIA A. FORRESTER,
Plaintiff-Appellant,

vs.

JUDGE HOWARD LEE WHITE,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Illinois, E. St. Louis Division.

No. 82 C 3231

GERALD D. COHN, Magistrate

ORDER

On consideration of the petition for rehearing *en banc* filed in the above-captioned cause by counsel for the plaintiff-

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* The Honorable William H. Timbers, Senior Circuit Judge for the Second Circuit, sitting by designation.

appellant, which petition we consider as a petition for rehearing and a suggestion for rehearing *en banc:* A majority of the judges on the original panel have voted to deny the petition, and a majority of the active judges have voted to deny the suggestion for rehearing *en banc*.** The petition is therefore DENIED.

** Judges Richard D. Cudahy, Richard A. Posner, and Frank H. Easterbrook voted to grant a rehearing *en banc*.